

IN THE MATTER OF	:	BEFORE THE
DOUG PARKINSON	:	HOWARD COUNTY
T/A ANTHONY SYLVAN POOLS	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 07-002V

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DECISION AND ORDER

On March 26, 2007, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Doug Parkinson, Petitioner, trading as Anthony Sylvan Pools, for an after the fact variance to reduce the 30-foot side setback to 19 feet for an in-ground swimming pool located in an RR-DEO (Rural Residential-Density Exchange Option) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

Madeline Johns, Esquire, represented the property owner. The Petitioner and property owner, Iris Doyle, testified in support of the petition. Carolyn Bueg and Stanley Bueg, residents of 14065 Clarksville Pike (Route 108) appeared in opposition to the petition.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. The subject property, known as 14055 Clarksville Pike, is located in the 5th Election District on the east side of Clarksville Pike (the "Property") and to the east side of a 30-foot right-of-

way about 2,000 feet southeast of MD. 108.¹ The Property is identified on Tax Map 40, Grid 21, as Parcel 448. The Property is also known as Parcel 9 on an unrecorded plat of Section One of the Fox Haven Subdivision.

2. The Property is a rectangular-shaped lot consisting of about 5.267 acres. The lot has about 200 feet of frontage on Clarksville Pike and is about 1200 feet deep.

It is improved with a two-story, detached, frame dwelling 47.4 feet wide and 29.7 feet deep. The house is located about 214 feet from the private road, 975 feet from the rear lot line, about 47 feet from the north side lot line, and 47 feet from the south side lot line.

The house is accessed from a curving, paved driveway leading to an unattached frame garage on the north side of the house. A septic field generally runs from the south side of the house and into the north side setback.

The natural topography slopes downward from the rear of the house to the rear property line. The rear section of the property is wooded.

Located to the rear and southeast side of the house is an in-ground kidney-shaped swimming pool, its closest edge located 19.4 feet from the south side property line.

3. The petitioner, the swimming pool contractor, is requesting a variance for the existing swimming pool. As Mr. Parkinson testified, the variance would cause the equipment to encroach 11 feet into the south side setback line.

4. Vicinal properties are also zoned RR-DEO and the adjacent properties along the private road are part of the Fox Haven Subdivision.

¹ While the Property and all lots in the Fox Haven Subdivision are actually located along a private road off Clarksville Pike, their mailing addresses are on Clarksville Pike.

5. An aerial photograph indicates the subdivision property on the south side of the Property is similar in property frontage and width. The property to the north appears to have somewhat more property frontage and width.

6. In the appeal petition, Mr. Parkinson states that the property is only 200 feet wide, which he states is unique for a 5.267-acre property. The petition also states the property is unique because the septic drain field running across the mid-rear yard blocked the pool's original desired location.

7. The petition asserts that the practical difficulty resulting from strict compliance with the side setback line is the property's narrowness.

8. The petition also requests the shape and topography of the property to be considered, because these features required a retaining wall to be built and caused the pool location to be moved to the south side.

9. Mr. Parkinson testified that the property was also unique because of the septic system, which runs through the center of the rear property behind the house to create a small building envelope behind the house. He stated the property was also unique owing to a rock formation, which caused the pool to be pivoted to its present location.

10. Applicant's Exhibit 1, a building permit for a single-family dwelling 26 x 42-foot, in-ground pool issued by Department of Inspections, Licenses, & Permits ("DIBP") and dated March 31, 2004, states that all minimum RR-DEO setback requirements have been met, including a 30-foot side setback. Exhibit 1 also includes the DIBP's final pool inspection approval dated August 19, 2004.

11. Mrs. Doyle testified that the property to the north is wider than hers and that the minimum Fox Haven lot is three acres. She also stated that she received a lawful building permit,

and that the pool had received a final, approved inspection.

12. Applicant's Exhibit 2, a letter dated March 13, 2007, from Frank Doyle to Fox Haven Neighbors, discusses the variance application and states the pool water line "was built in compliance with the 'residential code' and not the 'rural residential code' that applies to Fox Haven." He further asserts the pool installer's error came about during the digging of the stage when the installer discovered the long septic field across the back yard and a rock formation impossible to move."

13. DILP's comments note the original plot plan submitted with the application showed the pool at 32 feet from the side setback.

14. Protestant's Exhibit 3² is a boundary survey plat of the Bueg property, dated October 8, 2002, showing the property has 200 feet of property frontage, and is about 1,115 feet deep adjacent to the Property, about 1,133 deep on the south side, and about 200 feet wide on the rear property line.

15. Protestant's Exhibit 5A, B, and C show the pool area at about the same grade as the dwelling, creating a deeper slope toward the wooded area to the back of the lot.

16. Mrs. Bueg testified that the Property is exactly like her property and that the property to the north is 7-8 acres because it could not be perked. She also stated that the properties across the street were narrow.

CONCLUSIONS OF LAW

The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides that a variance may be granted only if all of the following determinations are made:

- (1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such

² Protestant's Exhibit 3 was inadvertently noted as Exhibit 4.

unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance does not comply with Section 130.B.2.a(1) and (3) and therefore must be denied.

1. The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation. Section 130.B.2(a)(1). This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

2. With respect to the first prong of the variance test, the Maryland courts have defined “uniqueness” thusly:

“In the zoning context, the ‘unique’ aspect of a variance requirement *does not refer to the extent of improvements upon the property*, or upon neighboring property. ‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to characteristics as unusual architectural aspects and bearing or party walls.”

North v. St. Mary’s County, 99 Md. App. 502, 514, 638 A.2d 1175 (1994)(italics added).

3. In this case, the Petitioner has not shown the Property is in any way unique such that the side setback requirement will disproportionately impact it. A review of Protestant's Exhibit 2 and Mrs. Bueg's testimony indicate the Property is generally the same size as the adjacent property to its south. Although the property to the north is larger than the Property, other vicinal properties share similar dimensions and its overall size does not pose a practical difficulty in complying with the side setback requirement.

4. The essence of the property owner's problem is that the property is long and narrow. The building envelope is therefore also long and narrow. It is clear there is substantial land several hundred feet to the rear of the septic field, where a pool might be built in an area that does not violate the side setback. The difficulty experienced by the property owners is their inability to locate the pool as near to their house as they would like.

5. The Petitioner argues the topography, the slope toward the rear of the property, and subsurface conditions, the discovery of a rock formation in the area of the pool's original location, make the property unique. However, the fact that the pool was actually constructed is evidence only that the rock formation precluded a location closer to the house. Furthermore, a

review of Protestant's Exhibit 3 and 5, showing grading to accommodate a level, in-ground pool, quite clearly demonstrates that topographical issues can be remedied by the appropriate grading.

6. Consequently, the Petitioner has not produced sufficient evidence to pass the first prong of the variance test; that is, he has not shown that the Property has any unusual or unique characteristic that causes the side setback restriction to disproportionately impact upon it.

7. In addition, the Petitioner's request does not pass the second prong. The Petitioner is not unreasonably prevented from making a permitted use of the Property because the pool may be located elsewhere on the property and still comply with the side setback requirement. For these reasons, the variance request fails to comply with Section 130.B.2.a(1).

8. Section 130.B.2.a(3) of the Zoning Regulations requires that any practical difficulty in complying with the setback requirement may not have been created by the owner. Most often, this "self-created hardship" rule comes into play when the owner has already constructed something on the property that violates the applicable zoning regulations, then requests relief from the regulation in order to avoid the hardship of removing the structure. See, e.g., *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995); *Evans v Shore Communications*, 112 Md. App. 284, 685 A.2d 4554 (1996); and *Ad+Soil, Inc. v. County Commissioners of Queen Anne's County*, 307 Md. 307, 513 A.2d 893 (1986). Because the practical difficulty in these cases arose from actions of the Petitioner and landowner, and not as a result of the disproportionate impact of the zoning regulations on the particular property, the cases failed the test for variances.³

This is precisely the situation in this case. Mr. Doyle argues in a letter to his neighbors (Protestant's Exhibit 4), that the variance is intended to rectify an error by the pool company,

³ The self-created hardship rule, while listed as the third variance criteria in the Section 130.B.2.a, is actually a complement to the first criterion. If the hardship is self-created, then it is not the result of a unique physical condition of the land and therefore fails the test of Section 130.B.2.a(1) as well.

which mistakenly built the pool water line in compliance with the "residential code" and not the "rural residential code." However, the building permit for the pool, Applicant's Exhibit 1, clearly states the requisite setback requirement for the RRDEO side setback is 30 feet. While the explanation for this mistake is that the error came about when the pool company encountered a long septic field and a rock formation, the building permit clearly shows the pool company had notice of the proper setback before these discoveries. The Maryland courts also make irrelevant whether the hardship was inflicted intentionally or unintentionally; if it was the result of the owner's action or that of a predecessor in title, the variance must be denied. *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 214 A.2d 810 (1965); *Cromwell*, 651 A.2d at 441.

While I recognize that correcting the encroachment may be a greater financial undertaking than if the Petitioner were allowed to maintain the pool within the setback, I may not take the cost of the work into consideration. "Hardship is not demonstrated by economic loss alone. It must be tied to the special circumstances [of the land], none of which have been proven here. Every person requesting a variance can indicate some economic loss. To allow a variance anytime any economic loss is alleged would make a mockery of the zoning program." *Cromwell v. Ward*, 102 Md. App. 691, 715, 651 A.2d 424 (1995), *quoting Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1036-37 (Utah 1984).

The courts have consistently held that any hardship must relate to the land, and not to the personal circumstances of the owner. See 3 Robert M. Anderson, *American Law of Zoning*, Section 18.30 (2d ed.). In this case, the practical difficulty in complying with the 30-foot side setback requirement is personal to the Petitioner and does not relate to the land itself. Consequently, the petition does not meet the requirements of Section 130.B.2(3).

9. Finally, the property owner argues that a building inspector approved the pool after a final inspection (Applicant's Exhibit 1). The mistake of a county official, however, cannot be the "practical difficulty" unique to the subject property required in order to authorize the grant of a variance. *Cromwell*, 651 A.2d 424, 441.

Conclusion

It is well established in Maryland law that any practical difficulty must relate to the land, and not to the personal convenience of the particular owner of the land. *Cromwell*, id. While it may be desirable for the Petitioner to be able to retain the swimming pool in its present location, it is not the role of zoning, nor should it be, to accommodate the personal wants or circumstances of each property owner. Rather, the purpose of zoning is to promote the orderly development of land through the imposition of uniform regulations and standards. Variances to these standards are therefore to be sparingly granted, and only under exceptional circumstances. *Cromwell*, 651 A.2d at 430.

Simply put, if I were to grant a variance to this Petitioner to accommodate the owners' personal desires and circumstances, then I must do so for every property owner who is similarly situated. Once granted, a variance is permanent and irreversible. Under such a system, variances would become the rule, and the Zoning Regulations would be rendered meaningless.

Moreover, "it is not the purpose of variance procedures to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements. When administrative entities such as zoning authorities take it upon themselves to ignore the provisions of the statutes enacted by the legislative branch of government, they substitute their policies for those of the policymakers. That is improper." Id. at 441.

The Petitioner in this case has not presented sufficient evidence to show that exceptional circumstances exist to warrant the grant of a variance to the setback requirements. Consequently, I am compelled to deny the request.

ORDER

Based upon the foregoing, it is this 2nd day of April 2007, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Doug Parkinson for a variance to reduce the required 30-foot side setback from a residential district for a swimming pool is **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.